UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 14th day of August, two thousand and six.

PRESENT: HON. DENNIS JACOBS,
HON. ROSEMARY S. POOLER,
Circuit Judges,
HON. EDWARD R. KORMAN,[*]
District Judge.

IN RE: ADLER, COLEMAN CLEARING CORP.,

Debtor,

EDWIN B. MISHKIN, as SIPA Trustee for the Liquidation of the Business of Adler, Coleman Clearing Corp.,

Plaintiff-Appellee,

-v.- **No. 05-6245-bk**

PHILIP GURIAN,

Defendant-Appellant,

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[*]The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

TALLY GROUP, S.A., ROCENA COMPANY, LTD., UBIQUITY HOLDINGS, LTD., a/k/a UMBIGQUITY HOLDINGS, S.A., MARAVEL AND ASSOCIATES, CASPIAN CONSULTING, LTD., and BAUMAN, LTD.,

Defendants.

FOR APPELLANT: JAMES E. FELMAN (Katherine Earle Yanes, on the brief), Kynes, Markman & Felman, P.A., Tampa, FL.

FOR APPELLEE: JAMES CORSIGLIA, Mitchell A. Lowenthal, & Shawn T. Hynes, Of Counsel, Cleary Gottlieb Steen & Hamilton LLP, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Marrero, J.).

UPON DUE CONSIDERATION, it is **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court be **VACATED** and the case **REMANDED** for further proceedings consistent with this order.

Philip Gurian appeals the decision of the United States District Court for the Southern District of New York (Marrero, J.) granting summary judgment on claims brought under the common law alter ego doctrine and Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), ("Section 20(a)") in favor of the Trustee ("Trustee") appointed by the Securities Investor Protection Corporation ("SIPC") for the liquidation of the Adler, Coleman Clearing Corp. ("Adler"). The Trustee's suit seeks to hold Gurian liable for the payment of default judgments the Trustee obtained against the defendant Bahamian corporations ("Bahamian Entities") for their participation in a fraudulent stock-trading scheme that ultimately resulted in the collapse of Adler. The Trustee alleges that Gurian created and controlled the Bahamian Entities as tools to effectuate this scheme. We assume the parties' familiarity with the facts, procedural background and issues presented for review.

To pierce the corporate veil under an alter ego theory, a plaintiff must demonstrate, inter alia, that the owner of the corporation used its control of the corporation to commit a fraud or wrong that resulted "in an unjust loss or injury to the plaintiff." Babitt v. Vebeliunas (In re Vebeliunas), 332 F.3d 85, 91-92 (2d Cir. 2003) (citing Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141 (1993)). The district court held that the prior default judgments obtained by the Trustee against DePrimo and the Bahamian Entities sufficed to establish this element. See Mishkin v. Gurian (In re Adler, Coleman Clearing Corp.), 399 F. Supp. 2d 486, 492 (S.D.N.Y. 2005) (holding that the default judgments "establish that the Bahamian Entities committed violations of the Exchange Act and common law fraud and deceit entitling the Trustee to recover damages on behalf of Adler."). However, the general rule is well-established that default judgments lack issue-preclusive effect.[2] See Abrams v. Interco, Inc., 719 F.2d 23, 34 n.9 (2d Cir. 1983) (observing that the "accepted view" is "that the decision of issues not actually litigated, e.g., a default judgment, has no preclusive effect in other litigation"); see also Amato v. City of Saratoga Springs, 170 F.3d 311, 323 (2d Cir. 1999) (Jacobs, J., concurring) ("Of course, a default judgment lacks preclusive effect in other litigation."); Restatement (Second) of Judgments § 27 cmt. e (1982). Thus, the district court erred in granting

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[2]Several other circuits have allowed a default judgment entered as a procedural sanction to be accorded preclusive effect in a subsequent action if the sanctioned party's abuse of the litigation process is of sufficiently outrageous severity. See, e.g., In re Docteroff, 133 F.3d 210, 215 (3d Cir. 1997); In re Daily, 47 F.3d 365, 368 (9th Cir. 1995); In re Bush, 62 F.3d 1319, 1324 (11th Cir. 1995); In re Jordana, 232 B.R. 469, 477-78 (B.A.P. 10th Cir. 1999). We need not determine whether to adopt this exception to the general rule denying preclusive effect because it would not apply here given the (relatively insignificant) delay and obstruction by the Bahamian entities in the defaulted actions--as the Trustee himself argues, the participation of the Bahamian Entities in those actions did not extend much beyond their appearance, and the record suggests that the time between the serving of the summons and complaint and the entry of default judgment was less than four months.

summary judgment in favor of the Trustee on the alter ego claim.[3]

Likewise, the district court erred in granting summary judgment in favor of the Trustee on the Section 20(a) claim. "In order to establish a prima facie case of liability under § 20(a), a plaintiff must show . . . a primary violation by a controlled person." Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998). The district court erroneously relied on the default judgments to establish this element. See In re Adler, Coleman Clearing Corp., 399 F. Supp. 2d at 494 ("The primary violations by the Bahamian Companies have been shown by means of the [default judgments].").

Given the procedural and factual circumstances of this case, we find no error in the district court's use of New York law to resolve the issue of piercing the corporate veil.

For the reasons stated above, the judgment of the district court is VACATED, and the case is REMANDED to the district court for further proceedings consistent with this order.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

By:_____

[3]The Trustee's argument that the default judgments constituted evidence tending to show that Gurian used the Bahamian Entities to commit a wrong that harmed Adler is of no avail. The default judgments may constitute evidence of the entry of default judgment in the amount specified against DiPrimo and the Bahamian Entities, but they are not evidence of the underlying wrongful conduct.